Supreme Court, U.S.
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No. 971594

In The

Supreme Court of the United States

October Term, 1997

MAURITS L. DEPRINS,

Petitioner,

vs.

WILLY VAN DAMME,
TRENDS, N.V.,
and FRANS CROLS,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Twelfth Appellate District At Tyler

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do the requirements of Due Process prohibit a Texas court from exercising personal jurisdiction over Belgian defendants who have been found to have established minimum contacts with Texas by making several defamatory telephone calls to Texas residents?

2. Should courts engage in a subjective evaluation of whether the exercise of personal jurisdiction in a particular case "offends traditional notions of fair play and substantial justice" after it has already determined that a defendant has purposefully established minimum contacts with the forum, and the plaintiff's claim arises directly from those contacts?

3. In determining whether the exercise of personal jurisdiction in a particular case "offends traditional notions of fair play and substantial justice," has consideration of the subjective factors outlined in the plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court* effectively elevated the doctrine of *forum non conveniens* to the level of constitutional mandate, thereby usurping the traditional prerogative of state legislatures to regulate the application of *forum non conveniens*?

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OPINIONS BELOW

This petition seeks review of the judgment and opinion of the Texas Court of Appeals for the Twelfth Appellate District at Tyler, reported at 953 S.W.2d 7 (Tex. App. – Tyler 1997). The court of appeals affirmed the trial court's dismissal of this case for want of jurisdiction.

The Supreme Court of Texas denied petitioner's Petition for Review by order dated January 8, 1998.

JURISDICTION

This court has jurisdiction to review the opinion and judgment of the court of appeals pursuant to 28 U.S.C. § 1257(3) because rights arising under the Constitution of the United States are claimed.

The order of the Supreme Court of Texas denying petitioner's Petition for Review is dated January 8, 1998. This petition is filed within 90 days of that date as required by 28 U.S.C. § 2101. Sup. Ct. R. 13.4.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Fourteenth Amendment:

Section 1 . . . No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due

process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

This is a slander case brought by a Belgian resident and citizen against three defendants, each of whom is also a Belgian resident. Trends, N.V. is a Belgian corporation that publishes a Belgian magazine called *Trends*. Frans Crols is the editor-in-chief of *Trends*, and Willy Van Damme is a journalist who was working on an assignment for *Trends*.

Van Damme, while in Belgium, made telephone calls to at least four persons in Texas, identified himself as a reporter for *Trends*, and told them that DePrins was the subject of criminal investigations in Belgium, had been indicted, and owed millions of dollars. The plaintiff, Maurits L. DePrins, brought suit in a Texas state court alleging that the statements made were false and defamatory, and damaging to his reputation.

The defendants sought dismissal for lack of personal jurisdiction, citing the burdens of litigating in Texas, and argued that the exercise of jurisdiction would violate the constitutional requirement of "fair play and substantial justice" under the due process clause of the Fourteenth Amendment.

The trial court dismissed all three defendants for lack of personal jurisdiction. It held that none of the defendants had purposefully established minimum contacts with Texas. It further held that the exercise of jurisdiction over

any defendant would offend the traditional notions of fair play and substantial justice and therefore be inconsistent with the constitutional requirements of due process. It further held that the phone calls were "extraterritorial conduct" and that jurisdiction based upon the effects of such extraterritorial conduct is proper only when the conduct is directed against a resident plaintiff.

The court of appeals, in a published opinion, affirmed the dismissal for lack of jurisdiction. The court of appeals held that the exercise of jurisdiction would be contrary to traditional notions of fair play and substantial justice even though the defendants *did* establish minimum contacts with Texas by making defamatory statements directed at Texas residents.

The Supreme Court of Texas denied DePrins' petition for review.

REASONS FOR GRANTING THE WRIT

I. IT IS UNNECESSARY TO LOOK BEYOND THE PURPOSEFUL ESTABLISHMENT OF "MINIMUM CONTACTS" WITH THE FORUM STATE TO DETERMINE WHETHER THE EXERCISE OF PERSONAL JURISDICTION OFFENDS TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE.

A. The Jurisdiction of Texas Courts is Co-Extensive with the Limits of Due Process

As this Court has previously recognized, the Texas long-arm statute[1] reaches as far as the Due Process

[1] TEX. CIV. PRAC. & REM. CODE Ann. § 17.042 (Vernon 1986).

Clause of the Fourteenth Amendment permits. *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 413 (1984). Thus, the only question for a Texas court to decide is whether the exercise of personal jurisdiction over a defendant is consistent with the Due Process Clause. *Id.*

B. "Minimum Contacts" have Historically been Defined as Those That Comport with Traditional Notions of Fair Play and Substantial Justice.

For half a century, the exercise of personal jurisdiction over a nonresident defendant was found to satisfy the requirements of due process whenever the defendant had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940). When, as in this case, a controversy is related to or "arises out of" a defendant's contacts with the forum, the "relationship among the defendant, the forum, and the litigation" is the essential foundation of personal jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

This Court has never clearly held that a Due Process analysis must look further than physical presence or "minimum contacts" to determine the constitutionality of personal jurisdiction. *See Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 623 (1990). The requisite "minimum contacts" were *defined* as those that would not offend traditional notions of fair play and substantial justice. *International Shoe*, 326 U.S. at 316.

"Traditional notions of fair play and substantial justice" were concerned solely with notice to the defendant that its contact with a foreign jurisdiction or its residents could subject him to litigation in the foreign jurisdiction:

> "[A]t the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis."

Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992).

C. The "Reasonableness Factors" are not Necessary to a Proper Due Process Analysis.

Beginning with *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), however, there has been considerable discussion as to whether "traditional notions of fair play and substantial justice" impose a constitutional requirement *in addition* to "minimum contacts":

> Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, [citation omitted]; the plaintiff's interest in obtaining convenient and effective relief, [citation omitted]; at least when that interest is not adequately protected by the plaintiff's power to choose the forum, [citation omitted]; the interstate judicial system's interest in obtaining the most efficient

> resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

World-Wide Volkswagen Corp, 444 U.S. at 292.

Perhaps significantly, the "reasonableness factors" identified in *World-Wide Volkswagen* were not relied upon in deciding that case, which turned solely on the defendant's absence of contacts with the forum state. *Id.* at 295. The discussion, therefore, stood as *dictum* having little meaningful impact on this Court's subsequent Due Process analyses.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the factors were discussed, but the resulting analyses did not call for a conclusion different than would have been arrived at by a simpler "minimum contacts" analysis. The opinion in *Burger King* is notable, however, because while it clearly states that the "reasonableness factors" are to be considered *after* determining that minimum contacts exist, *Burger King Corp.*, 471 U.S. at 476, it also observes that "[m]ost such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." *Id.*, at 477.

On at least two other occasions since *World-Wide Volkswagen*, the Court was able to determine that due process was not offended by the exercise of personal jurisdiction based solely on a minimum contacts analysis, without reference to the "reasonableness factors." *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982); *Calder v. Jones*, 465 U.S. 783 (1984). In another case, the Court found jurisdiction to be

lacking without reference to those factors. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The dissent in that case concluded that jurisdiction could be constitutionally asserted, but also reached that conclusion based solely on a "minimum contacts" analysis without referring to the "reasonableness factors." *Id.*, 466 U.S. 419-428 (Brennan, J., dissenting).

In fact, each of the five reasonableness factors in *World-Wide Volkswagen* have, at one time or another, been considered inappropriate to a Due Process analysis. Consideration of the inconvenience to the defendant was at one time considered to be irrelevant to Due Process by Justices Brennan and Stewart:

> [d]ue process requires only certain minimum contacts between the defendant and the sovereign that has created the court. *See Shaffer v. Heitner*, 433 U.S. 186; *International Shoe Co. v. Washington*, 326 U.S. 310. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant.

Stafford v. Briggs, 444 U.S. 527, 554 (1979) (Stewart, J., and Brennan, J., dissenting). Conversely, the fact that a defendant would *not* be inconvenienced has never justified the exercise of jurisdiction in the absence of minimum contacts. *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

The forum's interest in a dispute is also not properly a due process concern:

> It cannot be disputed that California has substantial interests in protecting resident children

> and in facilitating child-support actions on behalf of those children. But these interests simply do not make California a "fair forum," . . . to require appellant, who derives no personal or commercial benefit from his child's presence in California and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default.

Kulko v. Superior Court of California in and for the City and County of San Francisco, 436 U.S. 84, 100-101 (1978).

In a unanimous opinion, this Court has held that while the presence of the plaintiff in the forum may support jurisdiction because it shows that the non-resident defendant intended to cause harm in the forum, the plaintiff's lack of contacts with the forum has nothing to do with due process. *Calder v. Jones*, 465 U.S. 783, 788 (1984), *citing Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-781 (1984) . Factoring the plaintiff's interest in obtaining relief into the due process analysis is anything but "traditional," and may, ironically, result in less due process protection for defendants. *See* Mona A. Lee, *Burger King's Bifurcated Test for Personal Jurisdiction*, 66 TEMP. L. REV. 945, 966-967 (1993).

Finally, this Court has on two occasions noted that state sovereignty and federalism concerns are not addressed by the Due Process Clause. *Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, n. 10 (1982); *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987). *See also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 782 (1984) (Brennan, J., concurring).

D. Consideration of Additional Factors Has Caused Confusion and a Waste of Resources.

The "reasonableness factors" identified in *World-Wide Volkswagen* have been relied upon by this Court but once, and in that instance no clear majority opinion emerged. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). Nevertheless, in lower courts throughout the United States, it has become routine to at least recite these five factors and address them in some fashion. Perhaps wondering what else to make of the language in *Burger King*, and the plurality opinion in *Asahi*, they have crafted varied, complex and confusing formulae for introducing the interests of the plaintiff and the forum into the due process analysis, and balancing these interests against the traditional due process concern of fair notice to the defendant. *See generally* Lee, 66 TEMP. L. REV. 945 (comparing appellate cases applying these factors).

Lee's study concludes that consideration of these factors has done nothing to help courts decide jurisdictional questions and instead has wasted judicial resources:

> The case law shows that the separate inquiry into reasonableness is often superfluous and substantively adds little to a court's analysis. It appears that courts have used the reasonableness inquiry merely to lend credence to their decisions, or they have engaged in the reasonableness inquiry for the sake of following Supreme Court *dicta*. Consequently, in view of the concern for judicial economy, the additional reasonableness inquiry is a waste of court resources.

Lee, 66 TEMP. L. REV. at 966; *see also* Sean K. Hornbeck, *Comment: Transnational Litigation and Personal Jurisdiction Over Foreign Defendants*, 59 ALB. L. REV. 1389, 1393-1394 (1996).

Now, however, as more courts give their subjective notions of fairness equal dignity with the traditional notions of fairness inherent in the basic minimum contacts analysis, the risk is greater than a mere waste of judicial resources. One result of this trend is that a once-simple Due Process analysis has become more subjective and unpredictable. Another is that the factors traditionally associated with the doctrine of *forum non conveniens* are being elevated to the level of a constitutional mandate. In some cases, courts may be tempted to view the original minimum contacts analysis as completely superfluous.

II. CONSIDERATION OF SUBJECTIVE FACTORS LEADS TO INCONSISTENT AND UNPREDICTABLE RESULTS.

As co-equal sovereigns, the jurisdictional reach of each State should theoretically be subject to a uniform constitutional standard. However, the introduction of subjective factors into the constitutional analysis has led to widely disparate and unpredictable results. The court of appeals in this case, purporting to rely on *Asahi*, determined that jurisdiction was unconstitutional *despite the existence of minimum contacts* after considering the following factors: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and

effective relief; (4) the unique burdens placed upon the defendant who must defend itself in a foreign legal system; and (5) the procedural and substantive policies of other nations whose interests are affected, as well as the federal government's interest in its foreign relations policies.[2]

The holding in this case represents a break from the century-old practice of exercising jurisdiction over defendants who intentionally commit torts in the jurisdiction itself. Even before *International Shoe*, when personal jurisdiction generally required the physical presence of the defendant in the jurisdiction, the States indulged the fiction that commission of a tort within the jurisdiction constituted the voluntary appointment of an agent for service of process in the jurisdiction. *See Burnham v. Superior Court*, 495 U.S. at 616-617. After *International Shoe* made such fictions unnecessary, the States adopted long-arm statutes specifically reaching non-residents who committed torts in their territory on the premise that this certainly constituted the type of minimum contact that did not offend traditional notions of fair play and substantial justice. *Id.; see also* Linda A. Silberman, *"Two Cheers" For International Shoe (and None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 755-756 (1995).

More tellingly, the opinion of the court of appeals shows how the addition of the reasonableness factors to

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[2] The last two factors are substituted by Texas courts for the last two *Asahi* factors in international cases. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 232, n.17 (Tex. 1991).

the Due Process analysis has led to inconsistent and unpredictable results. For example, the court holds that the forum state, Texas, has little interest in the dispute beyond the need for Texas residents to testify as witnesses. *DePrins*, 953 S.W.2d at 16. In contrast, this Court has observed in a similar case that a defamatory statement published in the forum State directly injures the residents of the forum who are deceived by it. As a result, the State in which defamation is published has a significant interest in redressing the injury caused thereby, even when none of the parties are residents of the State. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776-7 (1984).

The court of appeals also speculated that the exercise of jurisdiction over foreign citizens might "unconstitutionally regulate the affairs of foreign parties and unreasonably interfere with the federal government's interest in conducting international relations, as well as Belgium's interest in regulating its own affairs and resolving the disputes among its residents." *DePrins*, 953 S.W.2d at 16. No evidence had been introduced regarding the supposed interests of the United States and Belgium. The court did nothing more than indulge its own subjective opinion regarding foreign relations, and made an argument that could be used to deny jurisdiction *in every case* involving foreign parties. Would a Texas court come to the same conclusion if a foreign aircraft had crashed into Texas, killing only the foreign residents on-board?

III. THE "REASONABLENESS FACTORS" ELEVATE THE DOCTRINE OF *FORUM NON CONVENIENS* TO THE LEVEL OF CONSTITUTIONAL MANDATE.

There is little or nothing to distinguish the "reasonableness factors" on which the court of appeals dismissed this case, and the factors that are considered in applying the discretionary doctrine of *forum non conveniens*. *Compare Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (forum non conveniens) and *Asahi*, 480 U.S. at 113. Certainly, they have been viewed as one and the same by many courts and commentators. *See, e.g., Dow Chemical Company v. Alfaro*, 786 S.W.2d 674, 698-700 (Tex. 1990) (Cook, J., dissenting); *see also* Russell J. Weintraub, *Asahi Sends Personal Jurisdiction Down the Tubes*, 23 TEX. INT'L L. J. 55, 62 (1988) ("The balancing of fairness considerations against minimum contacts raises, to the due process level, concepts usually associated with the discretionary doctrine of *forum non conveniens*.")

And yet, logically, the application of the *forum non conveniens* doctrine *presupposes* the existence of at least two forums in which the defendant is amenable to process. *Gulf Oil*, 330 U.S. at 506-507. If this doctrine is to be used to determine the limits of jurisdiction of a court, this aspect of the doctrine will be lost because there will be no power to retain jurisdiction if there is no alternative forum. Furthermore, the traditional province of legislatures to abandon the doctrine in certain cases would be usurped by the judiciary under the guise of constitutional interpretation. *See* Alex Wilson Albright, *In Personam Jurisdiction: A Confused and Inappropriate Substitute for*

Forum Non Conveniens, 71 TEX. L. REV. 351, 356-357, 399 (1992).

The doctrine of *forum non conveniens* has often been criticized for being applied in an inconsistent manner. *See* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985) (forum non conveniens has resulted in "a crazy quilt of ad hoc, capricious, and inconsistent decisions."); *see also Alfaro*, 786 S.W.2d at 685 n. 8. This inconsistency can be tolerated, however, as notions of federalism permit a state to voluntarily refrain from exercising its lawful jurisdiction.

However, the same degree of inconsistency cannot be tolerated in defining the constitutional scope of a State's jurisdiction. All States are equal, and the power afforded them by the Constitution must be equal.

Allowing the doctrine of *forum non conveniens* to creep into the Fourteenth Amendment by broadly interpreting the language used by the Court in *International Shoe* is just the sort of mischief that concerned Justice Black about the majority opinion in *International Shoe*.

> True, the State's power is here upheld. But the rule announced means that tomorrow's judgment may strike down a State or Federal enactment on the ground that it does not conform to this Court's idea of natural justice. I therefore find myself moved by the same fears that caused Mr. Justice Holmes to say in 1930:
>
> > "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe

> to be the constitutional rights of the States. As the decisions now stand, **I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.**" *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930).

International Shoe Co. v. State of Washington, 326 U.S. 310, 326; 66 S. Ct. 154; 90 L. Ed. 95 (1945) (Black, J., concurring) (emphasis added).

Adopting the doctrine of *forum non conveniens* as a constitutional mandate will inevitably detract from thoughtful development and application of legitimate due process boundaries.

> When judges have too much jurisdiction-declining discretion, they will inevitably not put in the hard work necessary to formulate and apply sensible jurisdictional rules.

Dow Chemical Company v. Alfaro, 786 S.W.2d 674, 685 (Tex. 1990).

It will only be by thoughtful development and application of sensible jurisdictional rules that certainty will be increased and litigation decreased. Sensible jurisdictional rules are forged by reference to the traditional exercise of jurisdiction and, where novel cases arise because of advances in technology or otherwise, by reference to the degree of intent to specifically act or cause effects in a particular jurisdiction. Once this threshold issue of fundamental fairness to the nonresident defendant has been crossed, then the doctrine of *forum non conveniens* can be applied in the discretion of the court in its traditional role of assuring fairness to all parties and interests involved.

This case demonstrates how the reasonableness factors can too easily be manipulated to be outcome determinative. The court of appeals ignored the clear interest of Texas in adjudicating this a tort committed within its boundaries, and gave deference to the speculative and unproved interests of another forum. The court of appeals stated its concern for the inability of a Texas court to compel testimony from foreign witnesses for the defendant, although no such witnesses were identified, and yet ignored the inability of a foreign forum to compel testimony from the only non-party witnesses identified in the record – the persons to whom the slander was published.

IV. THIS COURT SHOULD RETURN TO THE CLEAR "MINIMUM CONTACTS" TEST FROM *INTERNATIONAL SHOE*.

Unless this Court rejects use of the "reasonableness factors" as a constitutional mandate, the Due Process Clause is destined to suffer the same fate that has befallen the doctrine of *forum non conveniens*: it will become a patch-work of inconsistency, no more predictable than the individual judges who apply it. This unpredictability is far more harmful to non-residents doing business nationally or internationally than would be the more mechanical, yet predictable, exercise of jurisdiction over a foreign defendant who commits an intentional tort directed at the forum State.

As this Court noted forty years ago:

> As technological progress has increased the flow of commerce between the States, the need for

> jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.

Hanson v. Denckla, 357 U.S. 235, 250-251 (1958).

With developments such as the internet, this technological progress continues unabated, and perhaps has accelerated. The use of subjective factors as part of a constitutional analysis represent a step backward from traditional and predictable notions of jurisdiction, and has not noticeably aided the courts in their jurisdictional analyses. Consequently, this Court should resolve the confusion it created in *Burger King* and *Asahi* and return to the minimum contacts analysis articulated in *International Shoe*, which recognized that due process is limited by traditional, rather than subjective, notions of fairness and substantial justice. Many commentators have urged this Court to do exactly that. *See* Silberman, 28 U.C. DAVIS L. REV. 755; *see also* Albright, 71 TEX. L. REV. 351 (1992); *see also* Lee, 66 TEMP. L. REV. 945 (1993); *see also* Weintraub, 23 TEX. INT'L L. J. at 62; *see also* Shannon McGhee Hernandez, *Comment: Civil Procedure – Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.: The Reasonableness Inquiry in the Context of General Jurisdiction*, 27 MEM. ST. U.L. REV. 723, 741 (Spring 1997).

A concept as fundamental to American jurisprudence as personal jurisdiction deserves a definitive delineation. *International Shoe* was a model of clarity, simplicity and flexibility until the introduction of a subjective reasonable

analysis muddied the waters. It is time to clear the waters of personal jurisdiction once more.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Honorable Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the decisions of the Texas Court of Appeals and the district court, and remand this case to the district court for further proceedings.

Respectfully submitted,

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APPENDIX A

NO. 12-97-00082-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

MAURITS L. DE PRINS, APPELLANT	§	*APPEAL FROM THE 114TH*
V.	§	*JUDICIAL DISTRICT COURT OF*
WILLY VAN DAMME, F. CROLS, AND TRENDS, N.V. APPELLEES	§	*SMITH COUNTY, TEXAS*

Maurits L. De Prins ("De Prins"), plaintiff below, appeals the order of the trial court sustaining defendants' Willy Van Damme ("Van Damme"), F. Crols ("Crols"), and Trends, N.V. ("Trends") (collectively "Appellees") special appearance and dismissal for lack of jurisdiction. Two points of error are assigned. We will **affirm.**

According to the record, De Prins is a Belgian resident and citizen. Van Damme is a journalist, and a citizen and resident of Belgium. Trends is a Belgian corporation that publishes a Belgian magazine called "Trends." Crols, a citizen and resident of Belgium, is the editor-in-chief of trends.

In his lawsuit, De Prins asserted that Van Damme, while at home in Belgium, telephoned two residents of Texas. During these phone conversations, the journalist allegedly slandered De Prins by claiming that he had been indicted, was the subject of investigations in Belgium, and owed millions of dollars. De Prins further

maintained that Van Damme was within the course and scope of his employment or was the agent of Trends while making these calls in preparation for writing an article on the activities of De Prins and the Super Club. De Prins filed suit against the journalist, the magazine, and the editor, contending that the statements made to the Texas residents were untrue and damaging to his reputation.

Pursuant to TEX. R. CIV. P. 120(a), Appellees filed special appearances supported by affidavits in a plea to the jurisdiction of the court. These sworn statements alleged that Van Damme was a freelance journalist and that he only occasionally sold articles to Trends for publication. The affidavits also stated the following grounds for dismissal of the lawsuit: 1) none of the defendants had any previous substantial contacts with the State of Texas; 2) requiring them to defend the case in Texas would be burdensome because of language and unfamiliarity with the laws of Texas; 3) Belgium would be the most consistent forum to litigate the dispute; 4) the expense would be great; 5) Van Damme was physically incapacitated and could not appear in Texas; and 6) requiring them to appear and answer would not comply with the constitutional mandate of "fair play and substantial justice" under the due process clause of the Fourteenth Amendment. De Prins objected to the defendants' affidavits in regards to lack of "minimum contacts," complaining that the information provided by the affidavits had not been properly produced in supplemental response to his discovery requests. The trial court proceeded to dismiss all defendants for lack of jurisdiction.

In his first point of error, De Prins claims that the record establishes jurisdiction as a matter of law. He alleges that since Appellees failed to dispute Van Damme's telephone calls, the content and falsity of Van Damme's statements, or that the slander occurred in Texas, Texas courts have specific jurisdiction over them.

Appelles argue the De Prins did not assert a point of error challenging the district court's analysis of the "fair play and substantial justice" factors, nor expressly challenge any underlying factual finding. Consequently, he cannot attack the legal sufficiency of the trial court's conclusion. We disagree. In order to adjudicate the rights of the litigants justly, fairly, and equitably, we will construe De Prins' point of error liberally. *Anderson v. Gilbert*, 897 S.W.2d 783, 784 (Tex. 1995).

For a more definitive understanding of the issues before the trial court and upon what factors it based its decision, the trial court's findings of fact and conclusions of law are set forth below.

I. Findings of Fact

1. Plaintiff Maurits L. De Prins is a Belgian citizen. Plaintiff resides in Belgium.

2. Trends, N.V., is a corporation under the laws of Belgium. trends publishes a magazine called *Trends*. *Trends* is published in the Dutch language. *Trends* is a Belgian business publication with its offices in Belgium.

3. Trends does not maintain, and is not required to maintain, a registered agent in Texas. Trends has never maintained a place of business in Texas, and

has never had or maintained employees, servants or agents in Texas. Trends has never owned any property or any business located in Texas.

4. Trends has no subscribers in the state of Texas. Trends has no agreements with any person or entity for distribution of its magazine in the United States.

5. Trends has never recruited any employees in Texas. Trends has never contracted with any individual or business entities in Texas. Trends has never owned real or personal property in Texas or the United States. Trends has never conducted any marketing or advertising in Texas. Trends has never applied for or received loans or lines of credit with or from any financial institution in Texas.

6. Trends has never called or written anybody in Texas about Maurits L. De Prins at any time nor had anyone do [sic] so.

7. Since 1986, there have been only two occasions when an employee of Trends went to Texas. In or about 1986, a Belgian employee of trends went to Dallas to interview a Belgian businessman. In approximately September 1995, a Belgian employee of Trends, while elsewhere in the United States on other business, went to Dallas/Fort Worth to search public real estate records.

8. Frans Crols is editor-in-chief of *Trends* and has been since 1986. Frans Crols is a citizen and resident of Belgium, and his native language is Dutch. Mr. Crols lives in Antwerp, Belgium.

9. Frans Crols has never been to Texas. Frans Crols has never maintained a residence or place of business in Texas, and has never had or maintained employees, servants, or agents in Texas. Frans Crols has not ever owned any property or any businesses located in Texas.

10. Frans Crols has never recruited any employees in Texas. Mr. Crols has never contracted with any individuals or business entity in Texas. Mr. Crols does not own or lease, and has never owned or leased, any oil, gas or mineral interest in Texas.

11. Other than the above-captioned cause, Frans Crols has never appeared in any Texas court or been named as a party to any legal proceeding in Texas. Mr. Crols has never paid taxes to any Texas governmental agency. Mr. Crols has never had a bank account, investments or brokerage accounts in Texas. Mr. Crols has never applied for or received loans or lines of credit with or from any financial institution in Texas. Mr. Crols has never conduced any marketing or advertising in Texas.

12. Other than the lawyers associated with the above-captioned matter, Mr. Crols has never employed any lawyer, accountant, consultant or independent contractor in Texas. Mr. Crols has never been a shareholder of any Texas corporation or any corporation with its principal place of business in Texas.

13. Mr. Willy Van Damme is a resident and citizen of Belgium.

14. Mr. Willy Van Damme has never been an employee of Trends, N.V. Trends pays Mr. Van Damme only for articles he submits which are published in the magazine. No one with Trends ever instructed Willy Van Damme in any detail or manner of his work as a freelance writer. No one with Trends was aware that Mr. Van Damme called anyone in Texas or the United States at any time with reference to Maurits L. De Prins or anything else. No one to Trends instructed him to do so. There has never been any instruction for Willy Van Damme to call anyone anywhere.

15. Mr. Van Damme has never been to Smith County or any other county in Texas. Mr. Van Damme has never been to the United States. Mr. Van Damme has never maintained a residence or place of business in Texas, and has never had employees, servants or agents in Texas. Mr. Van Damme does not own and has never owned any property or any businesses located in Texas. Mr. Van Damme has never had any offices or employees in Texas. Mr. Van Damme has not ever recruited any employees in Texas. Mr. Van Damme has not ever recruited any employees in Texas. Mr. Van Damme has never contracted with any individuals or business entities in Texas.

16. Mr. Van Damme does not and has never owned any real or personal property in Texas or the United States. Mr. Van Damme does not own or lease, and has never owned or leased, any oil, gas or mineral interest in Texas. Other than the above-captioned case, Mr. Van Damme has never appeared in any Texas court or been named as a party to any legal proceeding in Texas. Mr. Van Damme has never paid taxes to any Texas governmental agency. Mr. Van Damme has never had any bank account, investments or brokerage accounts in Texas. Mr. Van Damme has never applied for or received loans or lines of credit with or from any financial institution in Texas. Mr. Van Damme has never conducted any marketing or advertising in Texas. Other than those associated with this case, Mr. Van Damme has never employed any lawyer, accountant, consultant or independent contractor in Texas. Mr. Van Damme has never been a shareholder of any Texas corporation or any corporation with a principal place of business in Texas.

17. Mr. Van Damme is a freelance journalist. Since 1979, Mr. Van Damme has submitted articles to *Trends* for

publication. Mr. Van Damme receives payment from Trends only for stories he submits which are published in the magazine.

18. In the course of investigating and preparing articles for *Trends* magazine concerning Maurits L. De Prins, Mr. Van Damme consulted with various individual sources. He assured such sources that their identities, and in some cases, information, would be kept confidential.

19. In the course of his investigation, Mr. Van Damme made inquiries over the telephone to four persons in Texas on the subject of Mr. De Prins, one of which was to James Chris Miller. The other three were with confidential sources. One refused to give Mr. Van Damme any information. The remaining two telephone calls to persons other than Mr. Miller were of limited duration. All of these inquiries took place within the course of one week. Mr. Van Damme made all telephone calls to Texas concerning Mr. De Prins from his home in Belgium. One of the four telephone calls was to Darrell Baldwin.

II. Conclusions of Law

1. Defendant Trends, N.V., is not subject to jurisdiction because it did not and has not ever purposely established minimum contacts with Texas.

2. Defendant Frans Crols is not subject to jurisdiction because he has never purposefully established minimum contacts with Texas.

3. Defendant Willy Van Damme is not subject to jurisdiction because he has never purposefully established minimum contacts with Texas.

4. The Court's assumption of jurisdiction over Defendant Trends, N.V., will offend the traditional notions of fair play and substantial justice and is inconsistent with the constitutional requirements of due process.

5. The Court's assumption of jurisdiction over Defendant Frans Crols will offend the traditional notions of fair play and substantial justice and is inconsistent with the constitutional requirements of due process.

6. The Court's assumption of jurisdiction over Defendant Willy Van Damme will offend the traditional notions of fair play and substantial justice and is inconsistent with the constitutional requirements of due process.

7. The Court believes the case of ***Tavoulareas v. Comas,*** 720 F.2d 192 (D.C. Cir. 1983) to be dispositive of the issue of jurisdiction in a defamation case brought in the circumstances alleged in this case.

8. The Court believes the case of *National Indus. Sand Ass'n. v. Gibson,* 897 S.W.2d 769, 776 (Tex. 1995) ("Jurisdiction based upon the effects of extraterritorial conduct within a particular forum is proper only when the extraterritorial conduct focuses upon a plaintiff residing in that forum.") is further dispositive of the issues in this case.

The standard of review of a plea to the jurisdiction is a factual sufficiency review, not a de novo review. *See* ***Hotel Partners v. KPMG Peat Marwich,*** 847 S.W.2d 630, 632 (Tex. App. – Dallas 1993, writ denied). As the trier of fact, the trial judge may draw reasonable inferences from the evidence. ***IFG Leasing Co. V. Ellis,*** 748 S.W.2d 564,

565-66 (Tex. App. – Houston [1st Dist.] 1988, no writ). We may not disregard his findings of fact on appeal if the record contains some evidence of probative value from which these inferences may be drawn, or unless the findings are so contrary to the overwhelming weight of the evidence as to be manifestly wrong. ***Valencia v. Garza,*** 765 S.W.2d 893, 896 (Tex. App. – San Antonio 1989, no writ). Although a party may not challenge a trial court's conclusions of law for factual sufficiency, we may review the conclusions the trial court draws from the facts to determine their correctness. ***Mercer v. Bludworth,*** 715 S.W.2d 693, 697 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.), *overruled on other grounds,* ***Shumway v. Horizon Credit Corp.,*** 801 S.W.2d 890, 894 (Tex. 1991).

A Texas court may exercise jurisdiction over a nonresident of the Texas long-arm statutes authorize the exercise of jurisdiction, and if the exercise of jurisdiction is consistent with state and federal constitutional guarantees of due process. ***Guardian Royal Exch. v. English China,*** 815 S.W.2d 223, 226 (Tex. 1991); ***Schlobohm v. Schapiro,*** 784 S.W.2d 355, 356 (Tex. 1990). Found at TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-17.069 (Vernon 1986), the statutes specifically authorize the exercise of jurisdiction over nonresidents "doing business" in Texas. When a person "commits a tort in whole or in part in [Texas]" he is, by statutory mandate, "doing business." TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986). De Prins correctly argues that the tort of slander occurs in the state in which it is heard, *i.e.,* published or circulated. ***Keeton v. Hustler Magazine, Inc.,*** 465 U.S. 770, 777, 104 S.Ct. 1473, 1479 (1984). We will assume, therefore, for the purposes of the following discussion, that appellees were

"doing business" in the State of Texas. The proper focus in determining if a nonresident is subject to the jurisdiction of Texas courts, however, is constitutional limitations of due process, not technical definitions of "doing business." ***Wright Waterproofing Co. v. Applied Polymers,*** 602 S.W.2d 67, 70 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.).

In order to comply with the federal constitutional requirements of due process, the plaintiff must initially show that the defendant had established "minimum contacts" with the forum state. ***Int'l Shoe Co. v. Washington,*** 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); *In re* ***S.A.V.,*** 837 S.W.2d 80, 85 (Tex. 1992); ***Guardian Royal,*** 815 S.W.2d at 230. "Minimum contacts" is a prerequisite because a fundamental goal of the due process test is to protect nonresident defendants. ***Schlobohm,*** 784 S.W.2d at 357. There must be a "substantial connection" between the defendant and Texas arising from action or conduct of the defendant purposefully directed toward Texas. ***Guardian Royal,*** 815 S.W.2d at 230. The trial court must examine whether the nonresident defendant has "purposefully availed" itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws. ***Id.*** at 226. The concept of "purposeful availment" insures that a nonresident will not be hailed into a jurisdiction based upon "random," "fortuitous," or "attenuated" contacts with the forum. ***Id.*** The purported contacts, whether drawn from conduct occurring inside or outside the forum, must justify a conclusion that the defendant should reasonably anticipate being called into that forum's courts. ***World-Wide Volkswagen Corp. v. Woodson,*** 444 U.S. 286, 297,

100 S.Ct. 559, 567 (1980); ***Guardian Royal,*** 815 S.W.2d at 226.

Jurisdiction may be established by evidence of either specific or general jurisdiction. De Prins claims that Texas courts have specific jurisdiction over Appellees. When this type of jurisdiction is asserted, the cause of action must arise out of, or relate to, the nonresident defendant's contacts with Texas. ***Schlobohm,*** 784 S.W.2d at 357. It requires a "substantial connection between the nonresident's action or conduct directed toward Texas and the cause of action in Texas." *Memorial Hospital System v. Fisher Ins. Agency, Inc.,* 835 S.W.2d 645, 650 (Tex. App. – Houston [14th Dist.] 1992, no writ). The concept of specific jurisdiction focuses on "the relationship between the defendant, the forum, and the litigation." ***Shaffer v. Heitner,*** 433 U.S. 186, 204, 97 S.Ct. 2569, 2579 (1977).

At a special appearance hearing, defendants asserting lack of personal jurisdiction have the burden of negating all bases of jurisdiction. ***Guardian Royal,*** 815 S.W.2d at 231 n.13; ***Siskind v. Villa Foundation for Educ., Inc.,*** 642 S.W.2d 434, 438 (Tex. 1982). On appeal we must review the record to determine if the Appellees negated every possible ground for personal jurisdiction. ***Gen. Elec. Co. v. Brown & Ross Int'l. Dist., Inc.,*** 804 S.W.2d 527, 529-30 (Tex. App. – Houston [1st Dist.] 1990, writ denied)

The analysis into whether in personam jurisdiction will lie does not stop there, however. In addition to "minimum contacts," constitutional due process also

requires that the assertion of personal jurisdiction comports with traditional notions of "fair play and substantial justice." ***Asahi Metal Indus. Co. v. Superior Ct. of Cal.,*** 480 U.S. 102, 113, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987); ***S.A.V.,*** 837 S.W.2d at 85; ***Guardian Royal,*** 816 S.W.2d at 231. Application of the concept of "fair play and substantial justice" requires the court to consider the following factors, when appropriate: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. ***Asahi,*** 480 U.S. at 113, 107 S.Ct. at 1033; ***Guardian Royal,*** 815 S.W.2d at 231. The Texas Supreme Court has stated that courts need not consider steps (4) and (5) in international disputes between foreign nationals. ***Guardian Royal,*** 815 S.W.2d at 232 n.17.

When, as in the present case, the defendants are foreign nationals, the court must consider the reasonableness of stretching the long arm of personal jurisdiction over national borders. ***Asahi,*** 480 U.S. at 115-17, 107 S.Ct. at 1034; ***Guardian Royal,*** 815 S.W.2d at 229. We should, therefore, also consider the following factors: (a) the unique burdens placed upon the defendant who must defend itself in a foreign legal system; and (b) the procedural and substantive policies of other nations whose interests are affected, as well as the federal government's interest in its foreign relations policies. ***Asahi,*** 480 U.S. at 115, 107 S.Ct. at 1034; ***Guardian Royal,*** 815 S.W.2d at 229.

As stated in its conclusions of law, the trial court relied upon *Tavoulereas v. Comnas*, 720 F.2d 182 (D.C. Cir. 1983), and *National Indus. Sand Ass'n. v. Gibson*, 897 S.W.2d 769 (Tex. 1995) in holding that the court had no jurisdiction over appellees. De Prins argues that the trial court's reliance upon these cases as being dispositive of the issues in this suit is misplaced. We disagree.

In *Tavoulereas*, the court held that the District of Columbia had no long-art jurisdiction where a defamation suit was based upon telephone calls made to the District from outside the area, and where neither defendant nor plaintiff were residents of the District. De Prins attempts to distinguish *Tavoulereas* from the instant case because the District's statute was not as far-reaching as the Texas counterpart, failing to extend as far as permitted by the U.S. Constitution. The District's long-arm statute reads in relevant part:

> The District of Columbia may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim of relief arising from the person's . . .
>
> > (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
> >
> > (4) causes tortious injury in the District of Columbia by an act or omission outside the district of Columbia if he regularly does business, engages in any other persistent course of conduct . . . in the District of Columbia.

D.C. CODE ANN. § 13-4235 (1981).

We are unable to discern any substantial difference in application of the two statutes on the issue to be decided. Both the Texas statute and the District of Columbia statute attempt to authorize jurisdiction over persons *outside* the forum who commit a tort *in* the forum. Both statutes are required to pass constitutional due process muster. We interpret ***Tavoulereas*** as standing for the proposition that in a slander suit, long-arm jurisdiction is not sufficiently established for constitutional purposes when both the plaintiff and defendant are nonresidents, and when the only contact involves telephone calls into the forum jurisdiction.

In ***National Indus. Sand Ass'n.,*** our Supreme Court rejected nonresidential specific personal jurisdiction based solely upon *effects or consequences* of alleged conspiracy with Texas residents. There, the Court said:

> Jurisdiction based upon the *effects* of extraterritorial conduct within a particular forum is proper only when the estraterritorial conduct focuses upon a *plaintiff residing in that forum.* ***Calder,*** 465 U.S. at 789, 104 S.Ct. at 1486. In ***Calder,*** the Supreme Court of the United States held that the mere fact that it was foreseeable that an allegedly slanderous article would be circulated and would have an effect in a particular state was an insufficient basis for an assertion of jurisdiction by that state's court over the nonresident defendants, an author and editor. ***Id.*** (citing ***World-Wide Volkswagen,*** 444 U.S. at 295, 100 S.Ct. at 566). Instead, the assertion of jurisdiction over the nonresident defendants by the state of the plaintiff's residence was proper because the defendants' intentional actions were *expressly aimed at the plaintiff and the defendants*

> *knew that the article would have its most devastating effect in the state in which the plaintiff lived and worked.* ***Id.*** 465 U.S. at 789-90, 104 S.Ct. at 1486-88. (emphasis ours).

National Indus. Sand Ass'n. v. Gibson, 897 S.W.2d at 776. We can determine no material difference in the "effects" of the conspiracy in ***National Indus. Sand Ass'n.*** and the "effects" of the defamation alleged in the instant case.

For the purpose of our analysis, we accept as true that Van Damme did make the allegedly defamatory statements to Texas residents, that he established "minimum contacts" when he did so, and the De Prins' lack of Texas citizenship or residency is not controlling.[1] Having said that, the trial court had sufficient evidence that jurisdiction would be contrary to the traditional notions of "fair play and substantial justice." In so finding, we give due deference to the trial court's hierarchal fact-finding duties.

In making this determination, we are mindful that the U.S. Supreme Court addressed this issue, and held that the facts of each case must be weighed to determine whether personal jurisdiction would comport with "fair play and substantial justice." ***Kulko v. California Superior Court,*** 436 U.S. at 84, 92, 98 S.Ct. 1690, 1696-97 (1978). and any inquiry into the reasonableness and fairness of

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[1] It is unnecessary that the plaintiff be a resident of or have even "minimum contacts" with the forum state to allow the assertion of jurisdiction. ***Keeton,*** 465 U.S. at 779. ***Keeton*** does not hold, however, that the court *cannot* consider the plaintiff's nonresidency as a factor in the determination of a fair and convenient forum.

requiring a defendant to defend himself in a foreign state necessarily requires determinations in which "few answers will be written in black and white." *Id.* "The greys are dominant and even among them the shades are innumerable." *Id.*

The present dispute is wholly between Belgium citizens. The alleged slanderous telephone conversations were: 1) made from Belgium; 2) during an investigation of another Belgian; 3) concerning affairs which occurred in Belgium; 4) to Texas citizens. There appears to be no assertion in the record that any occurrence or issue involves a resident of Texas. Nor did De Prins assert that he lacked a convenient forum in Belgium in which he could seek justice. Belgium has every interest in providing a remedy in a forum for the present dispute between its own citizens. Neither the State of Texas nor its citizens has a substantial interest in this dispute. It is unreasonable to require Appellees to defend themselves in a foreign country against charges which may require proof from other Belgium citizens. It is evidence that nearly all of the documents and witnesses to defend this suit are beyond the practical reach of the court's subpoena power. Distance and language barriers would seriously hamper communication and trial preparation. Appellees, as well as De Prins, would incur substantial travel and translation expenses, as well as escalating litigation costs. There is evidence in the record that Van Damme suffers from health conditions that would make travel particularly onerous and burdensome.

The only Texas interest alleged is the convenience to potential nonparty witnesses who reside in Texas. This argument is not sufficiently compelling to outweigh the

severe burden on Appellees and the drain on Texas judicial resources. Furthermore, the trial court could reasonably conclude that Texas jurisdiction of this case might unconstitutionally regulate the affairs of foreign parties and unreasonably interfere with the federal government's interest in conducting international relations, as well as Belgium's public interest in regulating its own affairs and resolving the disputes among its residents. *See* ***World-Wide Volkswagen,*** 444 U.S. at 292-94, 100 S.Ct. at 564-65 (holding that minimum contacts requirement ensures fairness to defendants and prevents states from treading upon each others sovereignty). We are not unmindful of the fact that by honoring the sovereignty and judicial systems of foreign nations, we encourage a reciprocal respect, thereby reducing the risk that the foreign nations will invade the domain of the United States. *See* ***Asahi,*** 480 U.S. at 113-15, 107 S.Ct. at 1033-34 (California's interests in the lawsuit were slight and did not support the extension of jurisdiction over the nonresident defendant where the dispute was between two foreign corporations concerning a transaction that occurred in a foreign country); ***Guardian Royal,*** 815 S.W.2d at 232-33 (Although minimum contacts were otherwise satisfied, Texas had a diminished interest in adjudicating a dispute between two foreign insurance companies, such that fair play and substantial justice required dismissing for lack of personal jurisdiction). As stated by our Supreme Court:

> [The interest of other nations], as well as the Federal Government's interest in its foreign relations policies, will best be served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an

> alien defendant outweighed by the minimal interests on the part of the plaintiff or the forum state. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."

Guardian Royal, 815 S.W.2d at 228-29 (quoting *Asahi,* 480 U.S. at 115, 107 S.Ct. at 1034-35). (other citations and quotations omitted).

The trial court correctly evaluated the previously enumerated factors and properly concluded that if the court maintained jurisdiction of appellees, it would offend "traditional notions of fair play and substantial justice." The district court's legal analysis is supported by the record. Point of error number one is overruled.

In his second point of error, De Prins claims that the trial court erred when it overruled his objection to the admission of evidence offered by Trends and Crols as to their lack of minimum contacts. His claim is based upon the defendants' supposed failure to produce that evidence in response to his First set of Interrogatories.

Upon being served with citation, Appellees all filed Special Appearances. Van Damme's pleadings incorporated the journalist's affidavit, and Crols' and trends' pleadings incorporated the editor's affidavit. De Prins served Appellees with Interrogatories, and Crols and Trends filed separate objections and responses thereto. Interrogatory No. 8 made the following inquiry:

> **INTERROGATORY NO. 8:** Identify each and every contact you have had in Texas and/or the United States regarding Maurits De Prins or Super Club since January 1, 1994.

The objections and responses to Interrogatory No. 8 by both Trends and Crols were as follows:

> **ANSWER:** [Trends/Crols] incorporates each and every of the incorporated objections set forth in section I. [Trends/Crols] objects to this interrogatory as it is overbroad and exceeds the scope of Texas Rule of Civil Procedure 120(a). Without waiving these objections, [Trends/Crols] responds that it will supplement this response.

Trends and Crols never formally supplemented this answer, but Van Damme and Crols mailed their second affidavits and their interrogatory responses to De Prins at the same time. Eight days before Appellees' special appearance hearing, De Prins filed a TEX. R. CIV. P. 215(5) motion to exclude any evidence that showed that Appellees had no minimum contacts with Texas. The basis for this motion was that Trends' and Crols' sole response to Interrogatory No. 8 was an undertaking to supplement, which they failed to do. In the alternative, De Prins asked the trial court to compel a response by Trends and Crols to his interrogatory. Trends and Crols argued that Van Damme's and Crols' second affidavits constituted "supplementation" of their interrogatory responses. Trends and Crols did not reassert any objections to Interrogatory No. 8. At the special appearance hearing, Appellees contested De Prins' assertion that he had set the 215(5) matter for hearing on the same day. Because of the court's reticence in hearing any proceeding before the special appearance, the trial court considered De Prins' rule 215(5) motion as an objection to the admission of the evidence. De Prins objected on the record to the admission of the affidavits, but the trial

court overruled his objection and admitted the affidavits. De Prins' maintains the following: 1) the affidavits constituted the only evidence before the trial court bearing on the lack of minimum contacts by appellees; 2) violation of TEX. R. CIV. P. 215(5) resulted in the loss of the opportunity to offer the resonsive evidence; and 3) the sanction was automatic, unless the offering party showed good cause why the evidence should be admitted. Rule 215(5) of the Texas Rules of Civil Procedure states the following:

> A party who fails to respond to or supplement his response to a request for discovery shall not be entitled to present evidence which the party was under a duty to provide in a response or supplemental response . . . unless the trial court finds that good cause sufficient to require admission exists. The burden of establishing good cause is upon the party offering the evidence and good cause must be shown in the record.

TEX. R. CIV. P. 215(5).

The sufficiency of answers to any given set of interrogatories must be decided on a case by case basis. "Provided that the opponent can determine which interrogatories they answer, supplemental responses need not be preceded by the particular questions eliciting them . . . [nor must] . . . supplemental responses . . . be labeled 'Supplemental Responses.' " ***Melendex v. State,*** 902 S.W.2d 132, 136 (Tex. App. – Houston [1st Dist.] 1995, no writ). Crols' second affidavit sets forth in detail Trends' and Crols' Texas contacts. De Prins recognized that the second affidavits of both Crols and Van Damme addressed information sought by Interrogatory No. 8, as

he relies on Van Damme's second affidavit for his minimum contacts arguments. Further, the affidavits provided answers that corresponded directly to the subparts of several interrogatories. *See* ***Id.*** at 136 (holding that expert report was "obviously" a supplementation of an interrogatory response "whether or not it was labeled as such); ***Soefje v. Stewart,*** 847 S.W.2d 311, 312, 314 (Tex. App. – San Antonio 1992, writ denied) (holding that letters identifying potential witnesses supplemented interrogatory responses).

De Prins contends that the affidavits failed to supplement the response to Interrogatory No. 8 because the interrogatory "asked for a description of all contacts that Trends and Crols *do* have with the state of Texas" and the affidavits "describe only the *specific* contacts that Trends and Crols *do not have* with the state of Texas." This argument misconstrues the record. While the second Crols affidavit reflects Trends' and Crols' dearth of Texas contacts, it nevertheless discloses the random, fortuitous, and attenuated contacts Trends and Crols *have* had with Texas. Thus, Trends and Crols substantially responded to Interrogatory No. 8.

De Prins' proposed application of rule 215(5) exalts form over substance and disregards the rule's spirit and intent. Texas courts have rejected such an interpretation. *See* ***F.D.I.C. v. Mediplex of Houston Ltd.,*** 889 S.W.2d 464 (Tex. App. – Houston [14th Dist.] 1994, writ dism'd by agr.); *see also* ***Solvex Sales Corp. v. Triton Mfg. Co.,*** 888 S.W.2d 845, 847 (Tex. app. – Tyler 1994, writ denied). Rule 215(5) is not simply a "procedural trap for the unwary." ***Solvex,*** 888 S.W.2d at 847. Rather, its purpose is to require complete responses to discovery to promote realistic

assessment of potential settlement and prevent trial by ambush. *Gee*, 765 S.W.2d at 396.

Furthermore, the special appearance hearing contemplated by Rule 120(a) is separate and distinct from any hearing on the merits of the underlying suit. The purpose of this proceeding is to determine initially if the trial court should assert authority over the defendant(s). The court is mandated to "determine the special appearance on the basis of the pleadings, any stipulations by and between the parties, such *affidavits* and attachments as may be filed by the parties, the result of discovery processes, and any oral testimony." TEX. R. CIV. P. 120(a). Any failure to supplement at this point in the proceedings, therefor, did not make he affidavits inadmissible for the purpose of constitutional determination of jurisdiction. We hold that the trial court did not abuse its discretion when it considered the affidavits for the purpose of determining jurisdiction.

Appellant's point of error two is overruled, and the trial court's judgment is **affirmed.**

CHARLES HOLCOMB
Justice

Opinion delivered July 31, 1997.
Panel consisted of Ramey, Jr., C.J., Holcomb, J., and Hadden, J.

APPENDIX B

[LOGO] **THE SUPREME COURT OF TEXAS**
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January 8, 1998

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RE: Case Number 97-1033

Style: MAURITS L. DEPRINS v. WILLY VAN DAMME, TRENDS, N. V., and FRANS CROLS

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Illegible
Courtland Crocker
Deputy

cc: Cathy S. Lusk, Clerk
Mr. R. Brad Burger

Supreme Court, U.S.
FILED
APR 27 1998
CLERK

No. 97-1594

In The

Supreme Court of the United States

October Term, 1997

MAURITS L. DePRINS,

Petitioner,

vs.

WILLY VAN DAMME, TRENDS, N.V., and FRANS CROLS,

Respondents.

On Petition for Writ of Certiorari to the Texas Court of Appeals for the Twelfth Court of Appeals District at Tyler

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In *International Shoe Co. v. Washington,* this Court first announced the jurisdictional requirement that a defendant must have "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. 310, 316 (1945) (citations and quotations omitted). Under this due process standard, is it constitutionally possible for the assertion of jurisdiction to violate fair play and substantial justice, even if the defendant has minimum contacts with the forum?

2. Should the Court overrule its holdings that the Due Process Clause protects the liberty interests inherent in considerations of fair play and substantial justice, in favor of limiting the jurisdictional inquiry to a mechanical minimum contacts rule and relying on the common law doctrine of *forum non conveniens*?

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondent N.V. Trends Magazine (improperly named as Trends, N.V.) hereby lists the corporate identities related to it: N.V. Roularta Media Group and N.V. European Business Press Group.

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STATEMENT OF THE CASE

Petitioner Maurits DePrins, a citizen and resident of Belgium, sued Respondents Trends, N.V., Frans Crols, and Willy Van Damme, who are also citizens and residents of Belgium. Trends is a corporation that publishes a Belgian periodical called *Trends*. Crols is the editor-in-chief of *Trends*. Although the Petitioner states that Willy Van Damme "is a journalist who was working on an assignment for *Trends*," (Pet. at 2), the record shows that Van Damme was a freelance writer, not a Trends employee, and that he did not receive any instructions or act at the direction of Trends. *See* A. 5, 6; *DePrins v. Van Damme*, 953 S.W.2d 7, 12 (Tex. App. — Tyler 1997, writ denied).

The Petitioner sued the Respondents in Texas state district court for Smith County, claiming Van Damme made slanderous statements in two telephone calls that originated in Belgium and terminated in Texas. Consistent with Texas state practice, Respondents filed special appearances contesting the court's jurisdiction, and subject thereto, moved to dismiss for *forum non conveniens*.

After hearing the evidence and making express findings of fact and conclusions of law, the district court dismissed the case. The court held that none of the Respondents made minimum contacts with Texas and that asserting jurisdiction would violate traditional notions of fair play and substantial justice. The Texas Court of Appeals for the Twelfth Court of Appeals District at Tyler affirmed, largely agreeing with the district court's findings and conclusions.

The petition inaccurately implies that the appellate court held that all three Respondents had minimum contacts with Texas. Pet. at 3. Rather, that court merely stated

> *[f]or purpose of our analysis*, we accept as true that Van Damme did make the allegedly defamatory statements to Texas residents, that he established "minimum contacts" when he did so, and that De Prins' lack of Texas citizenship or residency is not controlling.

A. 15; *DePrins*, 953 S.W.2d at 16 (emphasis added; footnote omitted). The trial court's findings about the lack of minimum contacts of Trends and Crols remain valid and unaltered.[1] In addition, the appellate court did not need to reach the question of whether Van Damme had minimum contacts to support its holding that jurisdiction was not proper.

REASONS FOR DENYING THE WRIT

The Court should deny the writ of certiorari because the Petitioner failed to raise most of the arguments presented in the petition in the Texas state courts. Further, the Texas Court of Appeals' application of traditional notions of fair play and substantial justice, coupled with the Texas Supreme Court's decision to deny review, does not conflict with any other state court of last resort or any decision of this Court. Rule 10(b), (c).

---

1. The Petitioner never effectively challenged the evidence concerning the relationship between Van Damme and Trends, or the relationship between Trends and its editor, Crols. Accordingly, the relevant factual findings by the trial court were unimpaired by the appellate court decision. *See Milliken v. Meyer*, 311 U.S. 457, 462 (1940) ("On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction. . . ."). Moreover, the Petitioner never effectively challenged the lack of Texas contacts by Trends and Crols. "The requirements of *International Shoe* . . . must be met as to each defendant. . . ." *Rush v. Savchuk*, 444 U.S. 320, 332 (1980).

I.

THE PETITIONER DEPRIVED THE TEXAS SUPREME COURT OF THE OPPORTUNITY TO EXAMINE THE SCOPE OF THE TEXAS LONG-ARM STATUTE AND THE TEXAS CONSTITUTION IN THE CONTEXT OF THIS CASE.

The Petitioner raises two new arguments: an attack on the application of the fair play and substantial justice factors in the jurisdictional inquiry, (Pet. at i, 5-12), and a challenge based on the interplay between due process and *forum non conveniens*. (Pet. at 13). Had the Petitioner raised these arguments in the Texas courts, Respondents could have raised additional defenses based on Texas statutory and constitutional law to address them. However, these issues were never addressed by the Texas judiciary because the Petitioner failed to timely raise them.

This case primarily concerns the reach of the Texas long-arm statute and its constitutionality. Tex. Civ. Prac. & Rem. Code § 17.042 (West 1998). The Due Process Clause is a restraint on the reach of the long-arm statute, while the statute itself grants affirmative jurisdictional power. *Helecopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991) (citing *Helecopteros*).

While the Texas Supreme Court has previously stated that the long-arm statute reaches to the limits of due process under the Fourteenth Amendment, that court might have held that the statute was not intended to reach this case based on its unusual facts. *Guardian Royal*, 815 S.W.2d at 226; *Schlobohm v. Schapiro*, 784 S.W.2d 355, 358 (Tex. 1990) (expressly rejecting the "mechanical application of any test," including its own, and

insisting on a case-by-case inquiry to determine the validity of jurisdiction); *see also Helecopteros*, 466 U.S. at 413 n.7 ("It is not within our province, of course, to determine whether the Texas Supreme Court correctly interpreted the State's long-arm statute."). The Texas long-arm statute differs from those in many other states, which expressly provide that jurisdiction is coterminous with the Constitution.[2]

While the Petitioner argues that the Fourteenth Amendment does not require a separate inquiry into "traditional notions of fair play and substantial justice," the Texas Supreme Court may construe the scope of protection afforded by the Texas Constitution's Due Course of Law Clause to require jurisdiction to comport with "fair play and substantial justice," regardless of the United States Constitution's requirements.[3] Texas may expand defendants' rights and need not extend its long-arm jurisdiction to the outermost limits of the United States

---

2. *See* Ariz. R. Civ. P. 4.2(a); Cal. Civ. Proc. Code § 410.10 (West 1973); La. Rev. Stat. Ann. § 13:3201 (West 1991); Nev. Rev. Stat. § 14.065 (Michie Supp. 1993); N. J. Ct. R. 4:4-4(e); Okla. Stat. Ann. tit. 12 § 2004F (West 1973); 42 Pa. Const. Stat. Ann. § 5322 (1981 and Supp. 1993); R. I. Gen. Laws § 9-5-33 (West 1998); Tenn. Code Ann. § 20-2-214 (1994 & Supp. 1995); Wyo. Stat. Ann. § 5-1-107 (Michie 1996).

3. *See Schlobohm*, 784 S.W.2d at 358 (stating that the Texas jurisdiction test provides, in part, that the assumption of specific jurisdiction "must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation") (citing *O'Brien v. Lanpar Co.*, 399 S.W.2d 340, 342 (Tex. 1966)); *see also* Texas Constitution, Art. 1, §§ 3, 19; *Pintor v. Martinez*, 202 S.W.2d 333, 335 (Tex. Civ. App. — Austin 1947, writ ref'd n.r.e.) (holding that a non-Texas citizen was entitled to protections under Texas Constitution).

Constitution. Thus, the Texas Supreme Court could have prevented Texas' reach over this case according to state law, thereby eliminating any constitutional questions for this Court. However, presented only with the question of whether the circumstances of this case satisfied minimum contacts and fair play and substantial justice in the earlier petition for review, the Texas Supreme Court denied review, finding that the Petitioner "present[ed] no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction." Tex. R. App. P. 56(b)(1).

This Court should deny certiorari when arguments were not raised and preserved below, because state courts should be given an opportunity to pass on relevant issues. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In this case, the heart of the petition for the writ of certiorari was never raised or preserved below. This Court should not reach out to take this case now, when the case could have been reviewed and decided on Texas law and public policy grounds.

The only issue preserved for review, whether the Texas appellate court properly applied the "fair play and substantial justice" mandate of the Due Process Clause to this case's particular and unusual facts, has little import to the jurisprudence of this Court or the Texas courts.

II.

FAIR PLAY AND SUBSTANTIAL JUSTICE ARE FUNDAMENTAL COMPONENTS OF THE DUE PROCESS EQUATION AND ARE CONSIDERED THROUGHOUT THE JURISDICTIONAL INQUIRY.

A. *Asahi* properly applies to block jurisdiction in this case.

This Court has held that the exercise of personal jurisdiction must be consistent with the Due Process Clause's inherent commandment of fair play and substantial justice, regardless of whether the defendant has technically sufficient minimum contacts with the forum. *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113-15, 116, 121-22 (1987). The Texas Court of Appeals below followed this Court's instructions and found that they would be violated if jurisdiction were exercised. The Petitioner's attack on the court's application of *Asahi* does not withstand scrutiny. *See* A. 16-18, *DePrins*, 953 S.W.2d at 16-17 (rejecting the Petitioner's proposed evaluation of fair play and substantial justice). This Court need not revisit the lower court's analysis and should sustain *Asahi* under the principle of *stare decisis*.

B. The minimum contacts requirement is not equivalent to due process.

The minimum contacts analysis is only one step for protecting due process interests in the context of jurisdiction. The Petitioner asserts that the minimum contacts test described in *International Shoe* completely exhausts the due process protections of the Fourteenth Amendment. On the contrary, that test, when viewed alone, is both under- and over-inclusive. The true *International Shoe* standard is not simply "minimum contacts," but includes the requirement that a defendant

> have certain minimum contacts with [the forum] such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Thus the "minimum contacts" for jurisdiction are defined as those that do not offend fair play and substantial justice. The petition's attempt to pull these phrases apart (and discard fundamental fairness and reasonableness) should fail. The proper standard is highly flexible and fact-bound, and is not reducible to a set of mechanical rules.

This can easily be seen in this Court's decisions. On one hand, exercising jurisdiction may be constitutional in cases involving contacts that would be far less than "minimum" in other circumstances. For example, in *Burnham v. Superior Court of California*, the Court upheld the constitutionality of transient ("tag") jurisdiction, because the practice does not conflict with traditional notions of fair play and substantial justice. 495 U.S. 604, 619 (1990). Thus, minimum contacts may not be a necessary constitutional condition for jurisdiction.

On the other hand, the Court has recognized that the mechanical application of a "minimum contacts" analysis may sweep too broadly to reach rare cases where jurisdiction would offend due process despite the presence of what would, in other cases, be more than minimum contacts. In *Asahi*, despite differing opinions regarding the parameters of the minimum contacts test, the Court recognized that test's potential shortcomings and concluded that principles of fair play and substantial justice inherent in the Due Process Clause ultimately determine whether jurisdiction is constitutional. *Asahi*, 480 U.S. at 113-14 (O'Connor, J., plurality op.), 116 (Brennan, J., concurring in part), 121-22 (Stevens, J., concurring in part).

Accordingly, an affirmative contact determination alone is not a constitutionally sufficient condition for jurisdiction. *See also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985); *World-Wide Volkswagen*, 444 U.S. at 292.

In *Asahi*, the Court did not restrict its vision to a microscopic evaluation of contacts when determining whether jurisdiction was proper. Justice O'Connor, writing for the plurality, stated, "[t]he strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction over Asahi *under circumstances* that would offend 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citing *International Shoe*, 326 U.S. at 316; quoting *Milliken*, 311 U.S. at 463) (emphasis added) (internal quotation omitted). Justice Stevens further explained that

> minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.

Id. at 121-22 (citations omitted).[4] Taking a broad perspective, the Court viewed the contacts in the context of the surrounding circumstances to see if jurisdiction was reasonable and consistent with fair play and substantial justice. The Texas courts below, following in this Court's footsteps, recognized that it was simply not fair or just to haul these foreign parties into court thousands of miles away based on two telephone calls in the context of this case, even if a single telephone call could satisfy the minimum contacts requirement and fairly support jurisdiction in the context of another case.

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4. In nearly parallel language, Justice Brennan agreed with Justices O'Connor and Stevens that the case was "one of those rare cases" where the propriety of jurisdiction was defeated due to inherent notions of fair play and substantial justice. *See Asahi*, 480 U.S. at 116 (Brennan, J., concurring).

The Court has long held that the Due Process Clause, brought to life through traditional notions of fair play and substantial justice, applies to many aspects of jurisdiction — not just minimum contacts — to ensure that constitutionally-mandated liberty interests are adequately protected. This Court identified fair play and substantial justice as the overarching goal years before deciding *International Shoe* and developing the minimum contacts analysis. Indeed, the Court in *International Shoe* relied on *Milliken v. Meyer,* which examined whether procedures for substituted service satisfied the rigors of the Due Process Clause. 311 U.S. 457, 463 (1940) (holding substituted service may satisfy due process if it was reasonably calculated to give actual notice, thereby fulfilling "the traditional notions of fair play and substantial justice implicit in due process are satisfied") (citation omitted). The Court in *Milliken,* in turn, relied on *McDonald v. Mabee,* wherein Justice Holmes wrote that enforceable judgments must be rendered consistently with "natural justice," that legal fictions should not be used to "deny . . . fair play" in respecting the Fourteenth Amendment, and that service of process must be adequate if "substantial justice is to be done." 243 U.S. 90, 91-92 (1917); *cf. Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314-15 (1950).

C. Due process cannot be measured mechanically.

This Court has repeatedly rejected rigid tests and "conceptualistic theories" that were offered as universal rules to control the constitutionality of jurisdiction. *Burger King,* 471 U.S. at 478 (citing *International Shoe,* 326 U.S. at 319; *Hoopeston Canning Co. v. Cullen,* 318 U.S. 313, 316 (1943)); *Kulko v. Superior Court of California,* 436 U.S. 84, 92 (1978); *Shaffer v. Heitner,* 433 U.S. 186, 204 (1977).[5] Due process is a

5. The Texas Supreme Court has also rejected "the mechanical application of any test, including the Texas formula." *Guardian Royal,* 815 S.W.2d at 231 (citations omitted).

fluid concept requiring an individualized inquiry and balancing of fairness and substantial justice. While the petition condemns this inquiry as wasteful, unpredictable, and constitutionally untenable, this Court has often required case-specific inquiries to protect constitutional liberty interests and fairness values.[6] The Constitution's protections should not be sacrificed on the altar of promised efficiency.

The wisdom in preserving concepts of "fair play and substantial justice" as a check on the mechanical application of any minimum contacts test is revealed in the current information age and global economy. Neither the authors of the Fourteenth Amendment, nor this Court in 1945, could predict the astounding growth not only in the transportation of people and goods, but also in the transportation of ideas, intellectual property, and speech. Even when contacts fall within the contours of "minimum contacts" found in earlier cases on different facts, cases may arise where fundamental fairness and justice — inherent in the Fourteenth Amendment — preclude jurisdiction. *See Burnham*, 495 U.S. at 622 ("For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether traditional notions of fair play and substantial justice have been offended.") (internal quotations and citation omitted). The Petitioner's plea to jettison these guiding principles risks nearly unconfined jurisdiction and

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6. *See, e.g., BMW of N. Am., Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996) (examining whether punitive damage are "grossly excessive" in violation of due process protections); *Michigan v. Clifford*, 464 U.S. 287, 291 (1984) (examining warrantless and nonconsensual searches under the Fourth and Fourteenth Amendments); *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (implementing due process analysis of administrative procedures prior to termination of fundamentally protected rights); *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (examining factors relating to due process right to a speedy trial).

jeopardizes fairness to all participants in the modern international economy.

D. Due process requires great care before imposing jurisdiction over foreign parties due to unique risks to fairness and international relations.

The Texas courts properly considered the unique burdens on foreign parties resulting from Texas jurisdiction. Both this Court and the Texas Supreme Court pay special attention to international cases. *Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."); *Guardian Royal*, 815 S.W.2d at 229. The important state and federal interests in controlling judicial systems should be respected.

III.

THE COURT SHOULD KEEP CONSTITUTIONAL REQUIREMENTS FOR JURISDICTION AND *FORUM NON CONVENIENS* SEPARATE.

The courts can distinguish between the Due Process Clause's jurisdictional requirements and the doctrine of *forum non conveniens*. While the principles may seem superficially similar, the two legal principles grow from different roots and serve different purposes. They are not interchangeable, and the Court should reject the Petitioner's conflation of these two concepts.[7]

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7. The Petitioner's reliance on a dissenting opinion by a Texas Supreme Court justice and a law review commentator does not prove that any or all courts view *Asahi* and *forum non conveniens* as "one in the same." Pet. at 13. Courts appreciate the difference. (Cont'd)

Forum non conveniens is a common law doctrine grounded in the courts' inherent power, likely dating back to Scottish law. *American Dredging Co. v. Miller,* 510 U.S. 433, 449 (1994). The doctrine applies only if jurisdiction exists, and focuses on a comparison of available fora and competing interests of both plaintiffs and defendants. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 255-56 (1981); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504 (1947). To contrast, the fair play and substantial justice analysis inherent in the Due Process Clause is a constitutional doctrine, which primarily focuses on whether the forum chosen by the plaintiff has power to hear the case at all. *International Shoe,* 326 U.S. at 316; *cf. Quackenbush v. Allstate Ins. Co.,* 116 U.S. 706, 1712, 1724 (1996) (noting the "distinct historical pedigree" of *forum non conveniens* and the *Burford* abstention doctrine). Moreover, *forum non conveniens* is essentially a procedural device that may be overcome by constitutional or statutory law, while no state legislature may extend jurisdiction in violation of the constitutional liberty interests.[8]

(Cont'd)
Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 575 (2d Cir. 1996) ("[i]ssues of convenience pertinent to a § 1404 motion and the related common law concept of *forum non conveniens* should not be conflated with the due process concerns that are the focus of the *Asahi* test") (citing *Foster-Miller, Inc. v. Babcock & Wilcox Canada,* 46 F.3d 138, 150 (1st Cir. 1995); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1501 (5th Cir. 1993) (Johnson, J., concurring in part), *cert. denied,* 510 U.S. 1044 (1994)).

8. For example, this Court has held that a state may preclude the application of *forum non conveniens* in state court admiralty cases. *American Dredging,* 510 U.S. at 453, 454 n.4 (stating that a state court may chose to "burden its judiciary with litigation better handled elsewhere"). Similarly, the state law of *forum non conveniens* governs state court cases under the Federal Employers' Liability Act, (Cont'd)

The outward similarity of factors applied under *Asahi* and *forum non conveniens* simply reflects overlapping characteristics of any location-based examination. Neither the Constitution nor the doctrine of *forum non conveniens* maintains an exclusive monopoly on fairness inquiries. Indeed, similar considerations of "the interests of justice" also surface when evaluating motions to transfer venue under federal and Texas law.[9] However, these comparable appearances do not mean these legal principles are clones.

The due process inquiry and *forum non conveniens* complement each other, rather than repeat one another. Exercising jurisdiction in a forum, when viewed in isolation, may pass the minimum guaranteed threshold of constitutionally-protected fairness. However, maintaining that jurisdiction, when

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(Cont'd)
45 U.S.C.A. § 56 (West 1986). *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950). After the Texas Supreme Court's conclusion that the doctrine of *forum non conveniens* was unavailable in Texas for certain cases, announced in *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 498 U.S. 1024 (1991), the Texas legislature amended the venue statute to expressly permit such dismissals. *See* Tex. Civ. Prac. & Rem. Code § 71.051(a) (West 1998) (providing that courts may decline to exercise jurisdiction over non-United States residents under *forum non conveniens*).

9. *See* 28 U.S.C.A. § 1404(a) (West 1993) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action. . . ."); Tex. Civ. Prac. & Rem. Code § 15.002(b) (West 1998) ("For the convenience of the parties and witnesses and in the interest of justice, a court may transfer an action. . . ."); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-31 (1988) (discussing factors weighed under § 1404(a)); *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964) (stating that motions to transfer venue must be decided according to "individualized, case-by-case considerations of convenience and fairness").

viewed in the context of the entire situation and potential alternative fora, may not be warranted.

The Petitioner's proposal for removing fairness from the due process inquiry and relying on the augmented application of the *forum non conveniens* doctrine would jeopardize defendants' liberty interests and potentially prejudice plaintiffs. The application of *forum non conveniens* is highly discretionary and reviewed only for an abuse of discretion. *Piper Aircraft*, 454 U.S. at 257. However, the application of constitutional legal principles is reviewed *de novo*. *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147, 150 (3d Cir. 1996). Accordingly, it would be more difficult for plaintiffs to overcome the deferential abuse of discretion standard of review on appeal if *forum non conveniens* replaced the constitutional jurisdictional inquiry.

CONCLUSION

At their heart, the Due Process Clause and its implementation by this Court permit jurisdiction when it is fair and reasonable, and prevent jurisdiction when it is unfair. Texas has stated that jurisdiction is not fair here. This Court should do the same.

Respectfully submitted,

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